86-345

No. -

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THREE WAY CORPORATION
and
BUDD MOVING SYSTEMS, INC.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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25 pp

QUESTIONS PRESENTED

The household goods transportation industry is currently restructuring itself pursuant to the new procompetitive philosophies of both the Motor Carrier Act of 1980 ("MCA") and the Household Goods Act of 1980 ("HGTA"). This case of first impression arises out of the Interstate Commerce Commission's ("ICC") implementation of Section 11342 of the HGTA, 49 U.S.C. § 11342, which requires the Commission to hold hearings to assess the permissibility of an agreement among motor carriers to pool or divide traffic or earnings if the proposed pooling agreement either is "of major transportation importance" or "there is substantial likelihood that the agreement or combination will unduly restrain competition." In view of the Commission's interpretation of its obligations under the new statute, and the precedential nature of its actions under review, the questions posed by the Petition are:

1. Did the Court of Appeals err in sustaining the Commission's decision to summarily (*i.e.*, without holding evidentiary hearings) approve and immunize a new pooling arrangement when such an arrangement achieved its purposes through the inherently anticompetitive device of restraining or limiting the scope of competitive services provided by individual ICC-certificated pool members?

2. Subsidiary questions arise out of the inconsistency of the Commission's actions below. Did the Court err in approving the Commission's actions which are:

   a. inconsistent with the purposes of the underlying statute;

b. inconsistent with its own guidelines implementing the HGTA;

c. inconsistent with its contemporaneous handling of another new van line pooling application;

d. inconsistent within its own Decision at bar wherein it struck down a discriminatory dual compensation scheme; and

e. inconsistent with its actions simultaneously granting operating authority to individual carrier-agents to provide the very service to the public which the new pooling arrangement now restrains and limits?

PARTIES

Petitioners Three Way Corporation and Budd Moving Systems, Inc. were Petitioners before the U.S. Court of Appeals for the District of Columbia Circuit. These Petitioners sought reversal of the Commission's decision in the Court of Appeals. Information concerning Petitioners, as required by Rule 28.1 of the Rules of the Supreme Court, is set forth in Appendix E to the Petition.

The Respondents urging affirmance of the ICC's decision were both the United States and the ICC. United Van Lines intervened in support of the Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-14a) is officially reported at 792 F.2d 232. The decision of the Interstate Commerce Commission (App. C, 17a-31a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1986 (App. B, 15a-16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 11342 of the HGTA, 49 U.S.C. § 11342, provides in pertinent part:

> (b)(1) Any motor common carrier of property may apply to the Commission for approval of an agreement or combination with another motor common carrier of property to pool or divide traffic or any services or any part of their earnings by filing such agreement or combination with the Commission not less than 50 days before its effective date. Prior to the effective date of the agreement or combination, the Commission shall determine whether the agreement or combination is of major transportation importance and whether there is substantial likelihood that the agreement or combination will unduly restrain competition. If the Commission determines that neither of these two factors exists, it shall, prior to such effective date and without a hearing, approve and authorize the agreement or combination, under such rules and regulations as the Commission may issue, and for such consideration between such carriers and upon such terms and conditions as shall be found by the Commission to be just and reasonable. If the Commission determines either that the agreement or combination is of major transportation importance or that there is a substantial likelihood that the agreement or combination will unduly restrain competition, the Commission shall hold a hearing concerning whether the agreement or combination will be in the interest of bet-

> ter service to the public or of economy in operation and whether it will unduly restrain competition and shall suspend operation of such agreement or combination pending such hearing and final decision thereon. After such hearing, the Commission shall indicate to what extent it finds that the agreement or combination will be in the interest of better service to the public or of economy in operation and will not unduly restrain competition and if assented to by all the carriers involved, shall, to that extent, approve and authorize the agreement or combination, under such rules and regulations as the Commission may issue, and for such consideration between such carriers and upon such terms and conditions as shall be found by the Commission to be just and reasonable.

STATEMENT

This proceeding, which involves both the Interstate Commerce Commission's initial interpretation of a new statute and a regulated industry currently undergoing restructuring, has implications far beyond the immediate adversely affected parties.

This Petition arises out of the Commission's summary immunization of a new pooling arrangement which substitutes a program of restraint limiting the competitive operations of independently certificated carrier-agents for the former policy authorizing full competition within the pool.

The household goods transportation industry is built upon ICC grants of antitrust immunity which authorize competitors to share markets and pool earn-

ings. As such, the industry exists as an accommodation between the antitrust and regulatory laws.

The agency system, which is a characteristic of the household goods transportation industry is, in turn, dependent upon ICC-immunized pooling arrangements. Because household goods traffic generally follows no predetermined pattern, an agency system aids carriers in securing return loads for maximum capacity utilization. Further, because most household goods movements occur during the four summer months, the agency system also helps alleviate equipment shortages during peak demand by sharing the household goods traffic.

Some ICC-approved and immunized pooling arrangements like United Van Lines' ("United") specifically embrace individually certificated, competitive carrier-agents within the immunized pool.

In the proceeding under review, the Commission, which has heretofore carefully evaluated the anticompetitive aspects of pooling arrangements on a case-by-case basis, summarily—*i.e.*, without hearing—authorized and immunized United's new pooling arrangement which completely repudiates its original procompetitive structure. Instead of encouraging its certificated carrier-agents to compete to the full extent of their individual certificated authority, United now restrains the geographic operations of its constituent carrrier-agents, even where that constraint conflicts with the carrier-agents' own specific ICC authority.

In the proceeding below, the Commission approved and immunized the new pooling arrangement without

affording the adversely affected carrier-agents (which it both authorized and obligated to perform transportation services for the public on their own authority by issuing individual certificates of public convenience and necessity) a hearing to present evidence of the anticompetitive nature of United's new pooling scheme.

United Van Lines is the Nation's third largest van line enjoying about 12% of the household goods transportation market in 1981. *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 220, fn. 7 (D.C. Cir. 1986).

United was formed some 30 years ago when the ICC approved and immunized a pooling arrangement among competitors. United's original charter specifically called for its constituent agents to continue to function as competitive carriers under their own ICC-granted certificates. In other words, under the original format United and its carrier-agents were specifically authorized to adopt the least anticompetitive form of traffic and revenue pooling by combining cooperative and competitive services under an umbrella of antitrust immunity. *Geitz Storage & Moving Co. Inc.—Investigation of Control*, 65 M.C.C. 257 (1957).

Pursuant to the original United pooling agreement, as carefully immunized by the ICC after extensive hearings, the constituent carrier-agents were expected "to continue the use of any operating authority as a carrier of household goods *within the territory authorized to be served by the agent under a certificate issued by the Commission.*" *Id.*, at 270 (Emphasis added).

At the time this present controversy began, the United pooling system was comprised of some 606

agents, more than 225 of which held independent operating authority from the ICC in their own names. While some of these certificated carrier-agents held separate authority from the beginning, others, encouraged by the procompetitive thrust of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793, and the Household Goods Transportation Act of 1980 ("HGTA"), Pub. L. No. 96-454, 94 Stat. 2011, followed the Congressional guide and obtained either new or additional independent authority from the ICC.

In belated response to this competition, and contrary to the original procompetitive structure of United Van Lines itself, the principal's management took two steps. First, it enacted a two-tiered compensation system pursuant to which United management imposed a 3% surcharge on the receipts of those carrier-agents that elected to exercise their ICC rights to haul goods for distances greater than 750 miles. And it imposed a graduated certificate-restricting scheme which applied to all of the more than 225 United carrier-agents (App. D, 36a-37a), and which culminated in the absolute prohibition of all individual carrier-agent operations beyond 1700 miles. United later sought ICC approval for its new competition-limiting pooling arrangement.

Thus, despite its original purpose and immunization order specifically insuring that each of the carrier-agents should operate to the full extent of its own certificated rights, United management now directed the constituent carrier-agents to chose certificate-restraining options in order to stay within the previous ICC-immunized pool. And, as stated above, it also imposed a discriminatory surcharge in the guise of a

"dual compensation plan" (which the Commission ordered United to "cease and desist from exercising" (App. C, 25a-26a) as an inducement for the certificated carrier-agents to comply with the new certificate-truncating pooling arrangement.

Even though the Commission did not notice United's application for immunization of its new pooling arrangement for public comment, twelve of the affected carrier-agents asked the Commission to hold a hearing under 49 U.S.C. § 11342 so that they might have a public forum to present their views regarding United's new pooling plan. United strenuously opposed its own agents' request for an evidentiary hearing arguing, in effect, for summary process immunization of the new certificate-restraining pooling arrangement.

The Commission's Employee Review Board found that neither of the statute's hearing-triggering standards were met and, therefore, summarily approved the new pooling arrangement. The Review Board held that "[t]he proposed modification of United's pooling agreement is not a matter of major transportation importance, and there is no substantial likelihood that the proposed modification will unduly restrain competition." (App. D, 48a). See, 49 U.S.C. § 11342(b)(1). In other words, the Review Board denied the various carrier-agents' requests for a hearing in a public forum.

The carrier-agents asked the Commission to reconsider the Review Board's denial of their request for an evidentiary hearing. The Commission, however, denied these pleas and at the same time incongruously explained that the findings of the Review Board are somehow "in accordance with the evidence." (App.

C, 28a). In other words, while denying the carrier-agents the protection of an evidentiary hearing, the Commission simultaneously held that "evidence" supported the immunization of United's new pooling arrangement. (App. C. 23a)

The Court of Appeals perpetuated the Commission's position of withholding an evidentiary hearing, and, at the same time, faulted the adversely affected carrier-agents for not submitting sufficient evidence. The reviewing Court criticized the carrier-agents for failing to "offer [ ] the Commission or this Court any reason to agree" with the proposition that "the lack of intra-firm competition will worsen the overall competitive nature of the industry." (App. A, 12a).

The Commission's handling of this case directly affected the rights of all 600+ United agents, at least with respect to chilling the potential use of their full substantive and procedural benefits under the MCA. More specifically, it summarily limited the rights—and, we submit, duties—of all of the 225+ certificated carrier-agents to exercise their individual operating authorities to the full extent granted by the ICC, and as specifically contemplated by the original ICC-immunized United pooling arrangement. (App. D. 36a-37a)

The Petitioners herein, along with other adversely affected carrier-agents simply asked the Commission to provide an unbiased forum to present evidence showing the anticompetitive impact of United's new pooling arrangement, which is so fundamentally different than the original pooling arrangement authorized by the Commission after extensive hearings. *Geitz, supra.*

Contemporaneously, the Commission did grant a full evidentiary hearing for a far less restrictive new pooling arrangement. *Atlas Van Lines, Inc.—Pooling*, 127 M.C.C. 799 (1983). Thus, the Commission was inconsistent both with its own prior treatment of United's pooling arrangement (*Geitz*) and a present restructuring of another van line.

It also acted inconsistently with its own policy articulated in the proceeding implementing the HGTA, *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599 (1981)("*Practices*"). There it stated that fostering "price and service *competition between and among principal carriers and their agents*. . .is now part of the national transportation policy and was the prime motivation. . .for enactment of both the new motor carrier and household goods legislation." *Id.*, at 632 (Emphasis added). The ICC did not even acknowledge, much less attempt to reconcile, its policy articulated in *Practices* with its refusal to grant a hearing to the adversely affected carrier-agents so that they may provide evidence showing the new pooling arrangement's adverse impact on "competition between and among principal carriers and their agents." And the Court below did not direct the Commission to explain the discrepancy between its policy statement, which is a purported guide to implementing HGTA, and its actions summarily approving United's new pooling arrangement, the mechanics of which specifically limit competition "between and among principal carriers and their agents."

Finally, the Petitioners below paid a severe price for asking the Commission to institute a hearing so that they could present their evidence and views of

the anticompetitive nature of United's new pooling arrangement. Because they refused to choose an "option" which would limit their ICC-granted authority, both Three Way Corporation and Budd Moving Systems were expelled from the United pool. This fact, in addition to being harmful to the Petitioners, sent a message to their former fellow carrier-agents. It also, in combination with the Commission's summary approval of United's new certificate-restraining pooling mechanism, provided a clear model for the presently restructuring household goods transportation industry.

United Van Lines is today engaged in another program to further constrain the ICC-certificated operations of the carrier-agents participating in its immunized pool.

REASONS FOR GRANTING THE WRIT

This is a case of first impression construing the hearing requirements of a new statute in the context of an industry undergoing competitive restructuring. Its impact, therefore, extends well beyond the immediate participants. As such, the regulated industry and the reviewing Court, as well as the adversely affected parties, were entitled to a record-based and factually grounded exercise of the Commission's expertise.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S SUMMARY IMMUNIZATION OF A NEW POOLING ARRANGEMENT. THE HEARING REQUIREMENTS OF THE HGTA SHOULD HAVE BEEN INVOKED PRECISELY BECAUSE THE INDUSTRY IS NOW BEING RESTRUCTURED

While the Court below recognized that the household goods transportation industry is being restructured (App. A, 8a), it also carefully noted that both the MCA and HGTA "sought to install a system of competition and *reduced* regulation in the industry." *Id.*, at 4a (Emphasis added). In other words, while the Commission's role has been "reduced," it has not been eliminated. The ICC still has Congressionally-delegated regulatory jurisdiction over the household goods transportation industry. And it is precisely because of that ongoing regulatory oversight that the Commission should have invoked its hearing process to provide an evidentiary record, both for itself and for the reviewing Court, from which it may guide the further restructuring of the affected industry in accord with the Congressional intent.

Because it did not grant the Petitioners,' and many other adversely affected carrier-agents' request for a hearing based on the inherently anticompetitive nature of the mechanism chosen to police the new pooling arrangement, the Commission, and correspondingly the Court, based their decisions on misperceptions of "evidence" or the lack thereof. (App. C, 23a, 28a, App. A, 12a).

Furthermore, the Commission's actions improperly put the Court into the position of acting as a regulatory agency *vis-a-vis* questions of transportation pol-

icy. Thus, the Court faulted Petitioners for not providing evidence showing that "the lack of intra-firm competition will worsen the overall competitive nature of the industry" (App. A, 12a), while at the same time, the Commission elsewhere articulated its expert view that fostering competition "between and among principal carriers and their agents. . .is now a part of the national transportation policy" and, indeed, was the prime motivation for the new household goods legislation. *Practices*, *supra*, at 632.

Moreover, the Court went on to quote the Commission's declaration that "the public interest is best served by protecting competition itself rather than these individual competitors" (App. A, 11a), yet affirmed the Commission's summary approval of a scheme which specifically restrained the competition "between and among principal carriers and their agents" to protect an individual carrier—United, in its role as the principal carrier.

Naked competitive restraint, rather than the enhanced competition intended by Congress in the MCA and HGTA (App. A, 4a, 11a), and, indeed, echoed by the Commission in *Practices*, *supra*, resulted from the Court's affirmance of the Commission's deliberately uninformed processing of the proceeding below.

Since this is a case of first impression, the agency charged by Congress to oversee the restructuring of the household goods transportation industry owed more to its regulatees and the reviewing courts.

If permitted to stand, the decision below will lead, and is now leading, the restructuring of the household goods transportation industry in a direction unintended by, and contrary to, Congressional intent.

II. THE COURT'S AFFIRMANCE OF THE COMMISSION'S ACTIONS ESTABLISHES A PRECEDENT CONTRARY TO CONGRESSIONAL INTENT AND OTHERWISE CONSISTENT COMMISSION POLICY

The Commission's action below—which summarily immunizes anticompetitive restraints on its own certificates as a mechanism to enforce compliance among members of a new pooling arrangement—is inconsistent with both the Congressional intent and its own otherwise consistent actions. If the Court's approval of the Commission's action at bar is allowed to stand, an aberrational decision will become the guiding precedent for an industry now restructuring itself.

Without arguing the merits of the case, we will briefly outline the inconsistency of the Commission's action in the instant proceeding.

A. The Commission's Action Is Inconsistent With Congressional Policy

The Court below succinctly stated the purposes of the MCA and the HGTA: "Both Acts sought to install a system of competition and reduced regulation in the industry, and the MCA had the express purpose of making it easier for carriers to enter the interstate market or expand their operations on an interstate basis." (App.A, 4a; see also, App. A, 11a). Despite this clear purpose, the Commission summarily approved a pooling plan whose operating mechanism specifically restrains the individual operating authorities granted by the Commission, and dissuades present non-carrier-agents from invoking their rights under the MCA.

We submit that the Commission's action raises grave doubt as to whether Congress would have ap-

proved the agency's accommodation of the policies of the MCA and HGTA with its hearing requirements under 49 U.S.C. § 11342. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984); *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

B. The Commission's Action Is Inconsistent With Its Own Policy Statement Implementing The HGTA

As we pointed out above, the Commission, in its rulemaking proceeding implementing HGTA, unequivocally stated its view that fostering "competition between and among principal carriers and their agents. . .is now part of the national transportation policy." *Practices*, *supra*, p. 632. Here, however, the Commission specifically allowed the competition "between and among [a] principal carrier[ ] and [its] agents" to be restrained as the mechanism driving the new United pool. This action is inconsistent with the Commission's own supposed policy guidelines.

C. The Commission's Action Is Inconsistent With Its Contemporaneous Handling Of Another New Pooling Arrangement

Atlas Van Lines, another ICC-immunized pooling arrangement, decided that it no longer wanted to pool traffic with certificated carrier-agents. Since pooling orders are permissive, *i.e.*, the Commission does not compel carriers to share traffic or revenues, Atlas' decision to terminate its pool was a private business decision not subject to the Commission's approval.

Later Atlas changed its mind and decided that it would pool traffic with certificated carrier-agents—but only in a very limited way. It would enter a pool with limited purpose carrier-agents whose certificated

authority only covered specifically defined classes of traffic—the so-called Kingpak and government traffic. (App. A, 7a-8a).

Only 30 such specialized carrier-agents were involved in Atlas' new pool. This relatively insignificant and highly specialized new pooling application was noticed in the *Federal Register* and accorded full hearing procedures.

On the other hand, United's new pooling arrangement, which constrained the full purpose certificated activities of all its more than 225 carrier-agents, was not set for hearing.

The Commission acted inconsistently in setting hearing for the limited purpose new Atlas pooling arrangement (involving only 30 carrier-agents) while, refusing to hear United's new pooling application which directly restrained more than 225 full service certificated carrier-agents, and dissuaded the remaining members of the 600-agent system from exercising their full benefits under the MCA and HGTA.

And, of course, the Commission acted inconsistently in refusing to set the new United pooling arrangement—which repudiated the very foundations of the original United pooling arrangement heard and approved in the *Geitz* case, *supra*—for hearings.

D. The Commission's Actions Within Its Own Decision Under Review Are Internally Inconsistent

As explained in the Statement, United's response to the expanded operating authority allowed its carrier-agents under the MCA was two-fold. It enacted a two-tiered compensation system under which it assessed a 3% surcharge on revenues of carrier-agents moving loads in excess of 750 miles. It also created

a so-called "option" program for all its certificated carrier-agents (App. D, 36a-37a) which *inter alia* prohibited carrier-agents from operating beyond a 1700-mile radius on their own ICC authority.

Addressing the propriety of the dual compensation system, the ICC stated that "the alteration of a compensation scheme in a discriminatory manner, giving preferential treatment to those carrier-agents that have acquiesced in its proposed new policy, is inherently coercive." (App. C, 26a). Thus, the ICC ordered United to "cease and desist from exercising its discriminatory dual compensation scheme now in effect." *Id.* Concurrent with striking down the "discriminatory scheme," however, the ICC immunized United's plan to prohibit long-haul carrier-agent operations altogether. These two actions are fundamentally inconsistent and constitute an arbitrary exercise of discretion.

The dual compensation scheme did not prohibit competition on long-haul runs in toto—it simply imposed a monetary disincentive. Thus, the plan had a chilling effect on long-haul competition which the ICC properly struck down. On the other hand, the new pooling arrangement eliminates long-haul competition beyond 1700 miles. In view of the express purposes of both the MCA and HGTA to facilitate competitive conditions, the ICC's action in upholding an absolute bar to competition in the long-haul market, while striking down a simple discouragement to it, is not only internally inconsistent, it also contravenes the express mandates of the two involved transportation acts, and is wholly arbitrary.

E. The Commission's Action Simultaneously Granting Certificated Operating Rights To Individual Carrier-Agents And At The Same Time Immunizing Their Principal's Plan To Restrict Or Restrain Those Certificates Is Both Inconsistent And Illogical

We will not dwell on this phenomenon at length. It is obvious, however, that something is amiss when a regulatory agency makes public interest findings that the public needs the service of individual carriers and embodies that finding in certificates of public convenience and necessity, and at the same time summarily immunizes a private entity's program to restrict or restrain those public franchises. This fact alone warrants a fully informed (*i.e.*, evidentiary record grounded) analysis by the Commission.

CONCLUSION

This case of first impression has moved the restructuring of the household goods transportation industry in a direction unintended by Congress, is at odds with otherwise consistent Commission action, and is antithetical to the very purposes for which United Van Lines was formed. As a result of the Commission's actions as affirmed by the Court below, a policy of competitive restraint has replaced a procompetitive accommodation which has characterized the United pooling arrangement from its inception. And that substitution of restraint for competition was accomplished by the Commission's summary immunization arising out of a threshold finding that restricting the operation of ICC-issued certificates will not unduly restrain competition.

The van line industry now has clear precedent authorizing it to restrain its certificated agents in a

manner inconsistent with the Congressional intent behind the MCA and HGTA. Instead of installing a system of competition "with the express purpose of making it easier for carriers to enter the interstate market" (App. A, 4a), the decision below makes it easier for principals to restrain the competitive activities of their carrier-agents.

Unless this Court intervenes, the nature of the household goods transportation industry will be fundamentally altered in a way contrary to Congressional intent. The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 1, 1986